

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

CHAMBER SUMMONS NO.1367 OF 2007

IN

SUIT NO.1009 OF 1973

Ratan Dinshaw Surveyor ...Plaintiff

Versus

Kailash Shamji Veera & Ors. ...Defendants

Ms D.S.Ratiwala for the Plaintiff.

Ms Sarkhot i/by Shri R.V.Govilkar for the Defendant
Nos.1 and 3.

Ms T.K.Bairagdar for the Defendant Nos.5(b) to 5(f).

Shri V.B.Kadu, Assitant Prothonotary (Admin) from Court
Receiver- present.

CORAM : ABHAY S.OKA, J.
DATED : OCTOBER 09th, 2007.

JUDGMENT:

1. I have heard the learned counsel appearing for the Plaintiff in support of the Chamber Summons. I have heard the learned counsel appearing for the Defendant Nos.1 and 3 who has opposed the Chamber Summons. I have also heard the learned counsel appearing for the 4th Defendant. The Chamber Summons has been filed in a suit for declaration that the partnership firm M/s.Arrow India constituted between the Plaintiffs and 1st and 2nd Defendants and the 3rd Defendant under a Deed of Partnership dated 29th November, 1968 stands dissolved from 03rd October, 1973. During the pendency of the suit, by an interim order this Court appointed Court

Receiver, High Court, Bombay as the Receiver of the assets and books of accounts of the said Partnership Firm. Accordingly, the Court Receiver acted upon the said order. This Court passed a preliminary decree on 12th March, 1992 for dissolution and rendition of accounts. This Court appointed the Commissioner for taking Accounts as Commissioner in terms of prayer (e) of the plaint. The Commissioner for taking accounts was directed to submit a report of the entitlement and/or liabilities of the different partners. Prayer clause (a) in the plaint reads thus:

"(a) It may be declared that the suit partnership stands dissolved as from 03rd October, 1973".

2. It is pointed out that the Commissioner for taking Accounts submitted to this Court a Report dated 18th July, 2006 stating that the parties have admitted the fact that none of them are having accounts nor they have filed statements of accounts on affidavit as directed. The said report mentions that the reference was removed under Rule 493 of the High Court (Original Side) Rules. As per Rule 500 of the said Rules the Plaintiff filed exceptions. By order dated 29th March, 2007 this Court held that the Commissioner for taking

Accounts was well within his powers to remove the reference and therefore, it cannot be said that the order passed by the Commissioner for taking Accounts is not legal and correct. This Court thereafter adjourned the matter to consider whether final decree can be passed. An Appeal was preferred by the Plaintiff for challenging the said order dated 29th March, 2007. The Appeal was dismissed by order dated 22nd June, 2007. While dismissing the Appeal, the Division Bench observed that the impugned order nowhere discloses any issue or part of the controversy in the matter having finally disposed of affecting rights of the parties. The Division Bench, therefore, held that the order was not appealable. After the Division Bench passed the order, the suit was placed before this Court.

3. In the report dated 16th August, 2007 submitted by the Court Receiver, High Court, Bombay it is stated that the Court Receiver produced books of accounts lying deposited with him before the Commissioner for taking Accounts on 08th June, 2006 and 13th July, 2007. It is stated that the books of accounts were returned to the Court Receiver on 20th June, 2006 and 14th July, 2006. The first prayer in the present Chamber Summons is that the learned Commissioner for taking accounts be directed re-enter the reference. The second prayer is for

issuing specific direction to the learned Commissioner for taking Accounts to call for books of accounts lying in the custody of the learned Court Receiver, High Court, Bombay and to ascertain entitlement or liabilities of each of the partners of the suit Partnership Firm. The third prayer is that a Chartered Accountant or any qualified accountant as this Court may deem fit and proper be appointed for assisting the Commissioner for taking the Accounts. The fourth prayer is that after finalisation of the accounts, final decree be passed in the suit.

4. The submissions of the counsel for the Plaintiff is that the Court Receiver, High Court, Bombay was appointed as the Receiver of assets and books of accounts of the Firm. It is submitted that though the Court Receiver produced the books of accounts from his custody, the Commissioner has not considered the same. The learned counsel pointed out that from the affidavit in reply filed by the Defendant No.1B it is apparent that the said Defendant has no objection if prayers (a) and (b) of the Chamber Summons are granted.

5. The learned counsel appearing for the contesting Defendant Nos.1 and 3 objected to the Chamber Summons by stating that exceptions were filed by the plaintiff to

the report dated 18th July, 2006 submitted by the Commissioner for taking Accounts and the action of the Commissioner has been upheld by this Court and the order of learned single Judge has been affirmed by the Division Bench of this Court in an Appeal preferred by the Plaintiff.

6. I have considered the submissions. It will be necessary to refer to the report dated 18th July, 2006. In the said report the Commissioner has noted as to how the proceedings went on before him. In the report he has noted that the examination-in-chief of the Plaintiff was recorded. He has noted that the Plaintiff admitted that he has not filed the statement of accounts on affidavit. Accordingly, under Rule 493 of the Rules, the Commissioner for taking accounts purported to return the reference. Under Rule 493 of the said Rules it is provided that where a party which has been directed to file a statement of accounts has made default in filing said account, the Commissioner shall debar him from taking any further part in the proceedings and may proceed with the hearing of the reference or he may direct any other party to file statement of account or he may remove the reference from his file or make such other order as he thinks fit.

7. As pointed out earlier there is already a preliminary decree passed in the present suit. While passing preliminary decree, necessary directions were issued to the Commissioner for taking Accounts. The Commissioner for taking Accounts has returned the reference mainly on the ground that statement of accounts was not filed by the Plaintiffs. In the examination-in-chief of the Plaintiff, he admitted that he had not filed any statement of accounts pursuant to the directions dated 07th April, 2006. The Commissioner for taking Accounts has noted the submission of the Advocate for the Plaintiffs that the first Plaintiff was never in the management of the suit Firm and never had any access to the books of accounts or the accounts. It is his case that all along the books of accounts were maintained by and under instructions of original Defendant Nos.1 and 3.

8. The report of the Court Receiver submitted on 16th August, 2007 reveals that on 08th June, 2006 and 13th July, 2006 the representative of the receiver produced the books of accounts of the Firm before the Commissioner for taking Accounts. Surprisingly the Commissioner for taking Accounts has not at all considered the said books of accounts which were produced from the custody of the receiver. The fact

that the Court Receiver produced the books of accounts clearly establishes the fact that the first Plaintiff could not have produced the same before the Commissioner for taking Accounts. Without examining the books of accounts produced by the Court Receiver, the Commissioner for taking Accounts has chosen to return the reference. When the Court Receiver produced the books of accounts before him, the Commissioner for taking accounts could have always given opportunity to the parties to led evidence on the basis of the said books of accounts.

9. The fact that books of accounts were produced by the Court Receiver before the Commissioner for taking Accounts has been disclosed only on 16th August, 2007 i.e after the Division Bench disposed of the Appeal. As pointed out earlier, the reference has been returned only on the ground that statement of accounts could not be produced by the Plaintiff. The fact that books of accounts were in the custody of the Court Receiver establishes that the Plaintiff could not have been blamed by the Commissioner for taking Accounts for failure to produce the statement of accounts. The action taken by the Commissioner for taking Accounts under Rule 493 is purely a procedural action. Once it is brought to the notice of this Court that books of

accounts were very much available, the Commissioner for taking Accounts will have to be directed to re-enter the reference. The judgment and order dated 12th March, 1992 passed by this Court directs the Commissioner for taking Accounts to do the exercise of accounting which would establish the entitlement of the parties. The Commissioner was expected to submit a report of the entitlement of the partners. On the basis of the accounts which are available with the Court Receiver the Commissioner for taking accounts will have to complete exercise in terms of order dated 12th March, 1992.

10. In so far as prayer clause (c) of the Chamber Summons is concerned, if the learned Commissioner for taking accounts needs help or assistance of an expert it is for him to take appropriate steps in that behalf and as of today the prayer clause (c) cannot be granted. In so far as prayer (d) is concerned, the same is misconceived. After the Commissioner for taking accounts submits a report, the law will take its own course.

11. Hence, the Chamber Summons is made absolute in terms of prayer clauses (a) and (b). Time of four months is granted to the Commissioner for taking accounts to submit the report. Time of four months will

be from the date on which an authenticated copy of this order is produced before the Commissioner for taking accounts.

12. Parties and the Commissioner for taking accounts to act upon an authenticated copy of this order.

JUDGE